No. 90-42

In The

Supreme Court of the United States

October Term, 1990

CLIFT C. LANE, INDIVIDUALLY, AND AS TRUSTEE UNDER THE CLIFT C. LANE REVOCABLE TRUST AND AS TRUSTEE UNDER THE DOROTHY P. LANE TRUST AND DOROTHY P. LANE, INDIVIDUALLY, AND AS TRUSTEE UNDER THE DOROTHY P. LANE REVOCABLE TRUST AND AS TRUSTEE UNDER THE CLIFT C. LANE TRUST,

Petitioners,

v.

WILLIAM B. SULLIVAN, INDIVIDUALLY, AND AS PARTNER OF THE LAW PARTNERSHIP OF ARENT, FOX, KINTNER, PLOTKIN AND KAHN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' STATEMENT OF QUESTION PRESENTED

Whether under the *Arkansas* law of collateral estoppel a particular, specific finding of fact by the trial judge in a prior civil action may bar the same plaintiffs from relitigating that fact in a subsequent civil action that imposes a lesser burden of proof.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

Although the Lanes' Statement of the Case contains several factual errors, they are not critical for purposes of this Court's resolution of the Petition for Writ of Certiorari. The reason is that the Lanes' case below was dismissed on the basis of collateral estoppel, which does not turn on the Lanes' misstatements of fact.

In this action, the Lanes claim that the respondent attorneys committed legal malpractice in connection with a stock transfer agreement executed on July 22, 1985. That transaction was the subject of prior litigation brought by the Lanes in the United States District Court for the Western District of Arkansas. *Lane v. Peterson*, No. 86-4069, *slip. op.* (W.D. Ark. July 2, 1987) ("Lane I"). After a five-day trial at which respondent William Sullivan and others testified, the trial judge found that the Lanes fully understood the nature and scope of the transaction at issue and that Sullivan had explained each document to the Lanes during the closing.[1] That determination was affirmed on appeal to the Eighth Circuit. *Lane v. Peterson*, 851 F.2d 193 (8th Cir. 1988). The Lanes' subsequent efforts to reopen the matter were denied, first, by the trial judge, and on appeal, by the Eighth Circuit. Still later, this Court denied certiorari. *Lane v. Peterson*, 110 S. Ct. 541 (1989).

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[1] The courts below quoted the following excerpt from the trial judge's factual findings in *Lane I*. "From the testimony, the Court finds that the Lanes clearly and completely understood the nature and the substance of each item which they signed. . . . " *Lane v. Sullivan*, 900 F.2d 1247, 1252 n.7 (8th Cir. 1990) (Pet. App. 14). *See also* 900 F.2d at 1253 (Pet. App. 14).

While the decision in *Lane I* was being appealed, the Lanes instituted this diversity action against respondent William B. Sullivan and his Washington, D.C., law firm, Arent, Fox, Kintner, Plotkin and Kahn. After considering the lesser burden of proof and the particular, specific fact finding in the earlier case that the Lanes fully understood the nature of the stock transfer, the trial court ruled that the Lanes' malpractice claim was barred by collateral estoppel. Although the Lanes disagreed with the trial court's application of collateral estoppel, they did concede that if they could not relitigate the fact of their understanding of the transaction, then their malpractice claim would necessarily fail due to lack of causation.

On appeal, the Eighth Circuit noted that Arkansas law would apply to this diversity case. *Lane v. Sullivan*, 900 F.2d 1247, 1250 (8th Cir. 1990) (Pet. App. 7). However, the Arkansas courts have apparently never addressed the narrow issue *sub judice*. The Court of Appeals therefore attempted to predict "what the Arkansas courts would do with differing burdens of proof." *Id.* (Pet. App. 8). In this connection the Court found it significant that the trial judge in *Lane I* concluded that "the evidence went beyond a showing that the Lanes had failed to disprove their understanding by clear and convincing evidence, and instead showed that they actually had understanding by at least a preponderance, if not more." (Pet App. 114) The Court of Appeals agreed with the District Court that "it would be difficult to find more forthright findings than those reached by Judge Harris in the trial of *Lane I* on the question of the Lanes' understanding." *Id.* at 1253 (Pet. App. 14). Relying in part on the *Restatement (Second) of Judgments* § 28, comment f (1980), the Eighth Circuit held

that, due to the specificity and particularity of the factual findings in *Lane I*, the Lanes should be collaterally estopped from relitigating the same issue, notwithstanding a change in the standard of proof. It therefore affirmed. The Lanes then filed their Petition with this Court.

REASONS FOR DENYING CERTIORARI

The Lanes portray this diversity case as one involving a split among the circuit courts of appeals. The Lanes suggest further that the Eighth Circuit's decision conflicts with prior holdings of this Court and thereby undermines the uniformity of the law as applied by the federal courts. Finally, the Lanes contend that the issue involved in this case is of recurring significance. The Lanes are wrong on all accounts.

No Split Exists Among the Circuits

The Lanes fail to mention that the Eighth Circuit was forecasting *Arkansas* law, not creating any *federal* rule on collateral estoppel. As the Eighth Circuit properly noted, the question presented was "what the Arkansas courts would do with differing burdens of proof," *Lane v. Sullivan*, 900 F.2d at 1250 (8th Cir. 1990) (Pet. App. 8), where the prior action yielded specific and detailed findings of fact. Apparently no other court, federal or state, has ever construed the Arkansas law of collateral estoppel in this context. Certainly the cases cited by petitioners do not. Consequently there is no "split" of authority. Moreover, even if this Court were to believe that the Eighth Circuit

incorrectly predicted how the Arkansas courts would handle the issue, the situation would be best left to the Arkansas courts to address in a future case.

The Lanes' split-among-the-circuits argument suffers from another fatal defect. The appellate decision that the Lanes claim is in their favor, *U.S. Aluminum Corp/Texas v. Alumax, Inc.*, 831 F.2d 878 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 68 (1988), never actually addressed the narrow issue presented herein: whether a specific, particular finding of fact rendered in a prior civil decision could provide a basis for collateral estoppel, notwithstanding any lessened burden of proof. As the Eighth Circuit correctly pointed out, *U.S. Aluminum*

> did not discuss the particularity, *vel non*, of the first judgment and whether specific findings therein might have allowed for the later use of collateral estoppel. We do not view *U.S. Aluminum* as dispositive of the case before us, in which we are convinced that collateral estoppel should be used.

900 F.2d at 1252 (Pet. App. 12).

Prior Supreme Court Decisions Have Not Addressed the Issue Presented Here

The Lanes' reliance on prior Supreme Court decisions, *e.g.*, *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984), is misplaced. Those cases simply do not address whether collateral estoppel can prevent relitigation of a particular, specific finding of fact when there is a lesser burden of proof in the subsequent proceeding, let alone how the Arkansas courts would decide

that narrow issue.[2] Since this Court has never dealt with the issue, there can be no inconsistency with the decision below.

The Issue Is Unlikely to Arise Frequently

The Lanes also contend that the issue presented herein "will arise regularly in the future." (Pet. 8). This is highly improbable since no Arkansas court (or federal court applying Arkansas law) has ever addressed the issue in the past. Yet even casting aside the fact that this case deals strictly with previously uncharted Arkansas law, the issue presented herein is so narrow that apparently only one other reported case, *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011 (6th Cir. 1983) (applying federal law on collateral estoppel), has ever actually addressed it. As in the decision below, *Marlene* found that, given the particularized and affirmative nature of the prior factual findings, collateral estoppel should be applied in a subsequent proceeding notwithstanding any change in the burden of proof. *Id.* at 1016-17.

Finally, the Eighth Circuit took pains to point out that its decision was based on a uniquely particularized record and not meant to "suggest a broad rule of law." 900 F.2d at 1253 (Pet. App. 15). Thus, although dispositive as between the parties herein, the ruling is by its own

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[2] In fact, in *One Assortment*, the jury in the prior action made no specific findings of fact upon which collateral estoppel could be based. *See United States v. One Assortment of 89 Firearms*, 685 F.2d 913, 919 (4th Cir.) (Winter, J., dissenting) ("in returning a verdict of not guilty, the jury did not specify the grounds of acquittal. . . . "), *rev'd*, 465 U.S. 354 (1984).

terms limited in scope and likely to have minimal impact on subsequent litigation.

CONCLUSION

The petition should be denied. The decision below is well-reasoned and just. Yet even more fundamentally, the question in this diversity case turns on an interpretation of the *Arkansas* law of collateral estoppel that no other court – state or federal – has ever addressed. Indeed, the only analogous case (*Marlene*), which applied federal law on collateral estoppel, reached the same conclusion as did the Eighth Circuit below. Unless and until the issue is developed further by the lower courts and a conflict develops, consideration by this Court would be premature.

Respectfully submitted,

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